No. 00-1100

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GREG RUGGIERO,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR REHEARING AND PETITION FOR REHEARING IN BANC

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INTRODUCTION AND SUMMARY OF ARGUMENT

A divided panel of this Court has invalidated, on constitutional grounds, a provision of the Radio Broadcasting Preservation Act of 2000 (RBPA), Pub. L. No. 106-553, 114 Stat. 2762, App. B, § 632. The provision at issue prohibits persons who have engaged in unlicensed radio broadcasting from applying for low-power FM radio licenses.

The panel majority did not dispute that the RBPA's provision served Congress's goal of increasing compliance with the Communications Act's licensing requirement; it quarreled with the extent to which it did so. 278 F.3d 1323, 1331 As Judge Henderson stated in dissent, it is both "reasonable" and "logical * * * to suspect that those who ignored the Commission's LPFM broadcast regulations in the past are likely to do so in the future." Id. at 1335. And it

is hardly unjust to require that, in the allocation of scarce radio licenses, law-abiders be preferred to law-breakers.

The panel majority nonetheless invalidated the statute. Applying a form of heightened minimal scrutiny identified in News America Publ., Inc. v. FCC, 844 F.2d 800, 814 (D.C. Cir. 1988), the panel majority found the statute unconstitutionally under- and overinclusive. 278 F.3d at 1330-33. On the one hand, the majority stated, the statute did not apply to persons whose conduct seemed (to the majority) to be equally disqualifying. Id. at 1331-32. On the other hand, the majority stated, the statute applied to some applicants whose conduct the majority thought posed an insufficient threat to Congress's goals. Id. at 1332-33.

The panel majority's ruling squarely conflicts with this Court's decision in Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996). Blount holds that even where the First Amendment is involved, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." 61 F.3d at 946.

The panel's decision is also an unwarranted and worrisome extension of this Court's heretofore-narrow holding in News America, which (as the panel majority recognized) invalidated a statute directed at "a single publisher/broadcaster, Rupert Murdoch." 278 F.3d at 1330. In the fourteen years since News America was rendered, the decision has been confined to its unique and extraordinary facts. It has been cited only infrequently, and, to our knowledge, has (until now) never been relied upon to invali-

date an Act of Congress. The panel majority's use of News America to strike down the RBPA provision threatens to encourage a wholly unwarranted intrusion by the courts into the legislative process and to bedevil this Court with a host of future challenges to federal enactments.

Reasonable minds frequently differ over the framing of a statute. But the Constitution does not empower the federal courts to perform Congress's legislative function. The panel's decision should not stand.[1]

STATEMENT

1. Federal law has long provided that all persons must obtain a license from the Federal Communications Commission (FCC) before engaging in radio broadcasting, 47 U.S.C. § 301, and that every application for a radio station license must "set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station." 47 U.S.C. § 308(b).

For many years, the FCC licensed a category of noncommercial educational radio stations, known as "Class D" stations, that were permitted to operate with a maximum of 10 watts of power. In 1978, in order to promote the "opportunity for other more efficient

[1] In remanding the matter to the Commission "for further proceedings not inconsistent with this opinion," the panel majority inexplicably vacated "the Second Low-Power Rulemaking" without qualification. 278 F.3d at 1334. That was plainly error, which the panel should correct. Ruggiero's challenge was limited to the RBPA's character qualification provision; the Second Low-Power Rulemaking implemented not only that provision, but several others which were not discussed (and which remain unaffected by) the panel's ruling. See Second Report and Order, Creation of Low Power Radio Serv., 2001 WL 310997 (FCC rel. Apr. 2, 2001), ¶¶ 2-9.

operations," the FCC halted the licensing of such low-power radio stations. Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations, 69 F.C.C.2d 240, 248-49, ¶¶ 23-24 (1978). Noncommercial educational FM stations were thereafter required to operate at a minimum power of 100 watts. 47 C.F.R. § 73.511(a) (2000).

"Over the next two decades, often in open defiance of this rule," a number of persons and entities – often referred to as "pirate broadcasters" – began operating low-power FM radio stations without seeking or obtaining a broadcast license. 278 F.3d at 1325. The FCC was forced to devote considerable resources to the (ultimately successful) enforcement of the statute's basic broadcast licensing requirement.[2]

In January 2000, responding to petitions for rulemaking, the FCC modified its low-power FM radio policies by adopting rules establishing two classes of low-power FM (LPFM) radio stations – one operating at a maximum power of 100 watts, and one operating at a maximum power level of 10 watts. Report & Order, Creation of Low Power Radio Service, 15 FCC Rcd 2205 (2000) (JA 916), on

[2] See, e.g., Grid Radio v. FCC, 278 F.3d 1314 (D.C. Cir. 2002); United States v. Szoka, 260 F.3d 516 (6th Cir. 2001); United States v. Neset, 235 F.3d 415 (8th Cir. 2000), cert. denied, 122 S. Ct. 61 (2001); La Voz Radio de la Communidad v. FCC, 223 F.3d 313 (6th Cir. 2000); United States v. Dunifer, 219 F.3d 1004 (9th Cir. 2000); United States v. Any and All Radio Station Transmission Equip. (Perez), 218 F.3d 543 (6th Cir. 2000); Prayze FM v. FCC, 214 F.3d 245 (2d Cir. 2000); United States v. Any and All Radio Station Transmission Equip.(Fried), 207 F.3d 458 (8th Cir. 2000), cert. denied, 531 U.S. 1071 (2001); United States v. Any and All Radio Station Transmission Equip. (Strawcutter), 204 F.3d 658 (6th Cir. 2000).

reconsideration, 15 FCC Rcd 19208 (2000).

The FCC "generally proposed to apply the same standards for character qualification requirements to all LPFM broadcasters as we do to full power broadcasters." 15 FCC Rcd at 2225, ¶ 51 (JA 936). After receiving comments ranging from amnesty for unlicensed broadcasters to per se disqualification, see id. at 2225-26, ¶ 52 (JA 936-37), the FCC determined that "unauthorized broadcasters would not be eligible for LPFM licenses unless they could certify that they (1) promptly ceased operation when directed by the Commission to do so if that direction was received prior to February 26, 1999), or (2) voluntarily ceased operation by February 26, 1999 (within 10 days of the publication of the Notice [of Proposed Rule Making] in the Federal Register)." 15 FCC Rcd 19208, 19245, ¶ 95 (2000).

2. In this case, Greg Ruggiero, a former unlicensed broadcaster, see Free Speech ex rel. Ruggiero v. FCC, 200 F.3d 63 (2d Cir. 1999), filed a petition for review of the FCC's LPFM license character qualification provision. Ruggiero contended that by disqualifying those unlicensed broadcasters who could not submit the required certification, the FCC's provision was arbitrary and capricious and violated the First Amendment.

After the case had been briefed and argued, Congress passed, and the President signed into law, the Radio Broadcasting Preservation Act of 2000 (RBPA), Pub L. No. 106-553, 114 Stat. 2762, App. B, § 632. The RBPA directs the FCC to "modify the rules authorizing the operation of low-power FM radio stations * * * to * * * (B) prohibit any applicant from obtaining a low-power FM

license if the applicant has engaged in any manner in the unlicensed operation of any station in violation of section 301 of the Communications Act of 1934." Id. § 632(a)(1)(B) (emphasis added). In accordance with the RBPA, the FCC's character qualification rules currently provide that "No application for an LPFM station may be granted unless the applicant certifies, under penalty of perjury, that neither the applicant, nor any party to the application, has engaged in any manner including individually or with persons, groups, organizations, or other entities, in the unlicensed operation of any station in violation of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301." 47 C.F.R. § 73.854 (2001).

3. The panel directed the parties to file briefs "addressing petitioner Ruggiero's constitutional arguments as they apply to the Act and any implementing orders or regulations the Commission may issue." Order dated Jan. 8, 2001, at 1. The case was reargued, and in a 2-1 decision, the panel (Rogers, Tatel, JJ.; Henderson, J., dissenting) held the RBPA's character qualification provision unconstitutional.

Relying on News America Publ., Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988), which invalidated a statute directed at the activities of a "single publisher/broadcaster" (278 F.3d at 1330), the panel majority applied heightened scrutiny to the RBPA's character qualification provision. Id. at 1331. The panel found it unnecessary to "exact[ly] characteriz[e]" the appropriate level of scrutiny, finding "any that is appreciably more stringent than 'minimum rationality' requires invalidation of the challenged

provision." Ibid.(citation omitted).

The panel majority found the RBPA's provision, like that in News America, to be "astonishingly underinclusive," because "the provision bans low-power license applications only from broadcasters who have operated without a license, leaving the Commission free to evaluate applications from anyone else under its pre-existing, more permissive character qualification policy." Ibid. The panel majority also criticized the provision for "cover[ing] circumstances only marginally related to the purpose of increasing regulatory compliance" because it disqualified, among others, unknowing or rehabilitated violators. Id. at 1332. The majority stated that the "under- and overinclusiveness" of the RBPA's character qualification provision was "particularly troubling" given the Commission's prior LPFM character qualification rule, which the majority viewed as a "less restrictive and better aimed alternative." Id. at 1333.

"Overall," the majority stated, it found the RBPA provision "so poorly aimed at maximizing future compliance with broadcast laws and regulations as to 'raise[] a suspicion' that perhaps Congress's 'true' objective was not to increase regulatory compliance, but to penalize microbroadcasters' 'message.'" Ibid. The majority stated, however, that it "need not endorse the pirates' tactics * * * nor believe the RBPA discriminates against pirates' 'message' to conclude, as we did in News America, that the provision's inaccurate aim is fatal." Ibid. The majority therefore granted Ruggiero's petition for review. Id. at 1334.

Judge Henderson dissented. "This case," she stated, "is noth-

ing like News America." Ibid. She saw "no reason the legislature cannot permissibly tackle a single part of a perceived problem (including one touching on the First Amendment) through a statute, such as the one here, which is neither overinclusive nor underinclusive." Id. at 1335 n.2. And she asked, "[w]hat could be more reasonable or logical than to suspect that those who ignored the Commission's LPFM broadcast regulations in the past are likely to do so in the future and therefore to head them off." Id. at 1135.

ARGUMENT

"No one has a First Amendment right to a license or to monopolize a radio frequency." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969). National Broad. Co. v. United States, 319 U.S. 190, 227 (1943)("[t]he right of free speech does not include * * * the right to use the facilities of radio without a license"). Because of "[t]he physical limitations of the broadcast spectrum," as well as "problems of interference between broadcast signals," it has long been recognized that "Government allocation and regulation of broadcast frequencies are essential." FCC v. National Citizens Comm. for Broad., 436 U.S. 775, 799 (1978). As a result, content-neutral regulations that are "a reasonable means of promoting the public interest * * * do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." NCCB, 436 U.S. at 802; accord Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1045-46 (D.C. Cir. 2002).

The RBPA's character qualification provision advances the government's legitimate – and wholly content-neutral – interest in ensuring compliance with the Communications Act's fundamental

requirement that broadcasters obtain a license. As Judge Henderson observed, it is entirely "reasonable" and "logical * * * to suspect that those who ignored the Commission's LPFM broadcast regulations in the past are likely to do so in the future," and it is for that reason entirely appropriate for Congress "to head them off." Id. at 1135.[3] The provision advances the government's interests in insuring a fair allocation of the limited number of LPFM licenses by preferring applicants who have complied with the broadcast licensing requirement over those who have not. Because the statute is a reasonable method of advancing the government's interests in regulating the allocation of broadcast licenses, it is constitutional.

1. The panel majority did not dispute that the RBPA's character qualification provision advances Congress's proffered goal of "increas[ing] compliance with Commission regulations." 278 F.3d at 1331. The majority nonetheless found the RBPA's character qualification provision constitutionally infirm because it was "poorly aimed." Id. at 1332. The majority's decision squarely conflicts with Blount v. SEC, 61 F.3d 938, 946 (D.C. Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

The panel majority stated that the provision was "astonishingly underinclusive," because it "bans low-power license applications only from broadcasters who have operated without a li-

[3] This is particularly so given that, as this Court has recognized, "[t]he FCC relies heavily on the honesty and probity of its licensees in a regulatory system that is largely self-policing." Contemporary Media, Inc. v. FCC, 214 F.3d 187, 193 (D.C. Cir. 2000), cert. denied, 532 U.S. 920 (2001).

cense," and leaves the "Commission free to evaluate applications from anyone else under its preexisting, more permissive character qualification policy." 278 F.3d at 1331. The majority also criticized the provision because "[i]t covers circumstances only marginally related to the purpose of increasing regulatory compliance," including unlicensed broadcaster who were unaware of the licensing requirement or who can demonstrate that they have been rehabilitated. Id. at 1332. The majority found the provision's "over- and underinclusiveness * * * particularly troubling" because it considered the Commission's prior character qualification rules – which "allowed for the possibility of waiver in certain circumstances and applied only to former pirates who continued to operate in spite of a Commission request to shut down" – to be "a less restrictive and better aimed alternative." Id. at 1333.

But this Court held in Blount that, even where the First Amendment is involved, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." Blount rejected a First Amendment challenge to rules promulgated by the Municipal Securities Rulemaking Board that "restrict[ed] the ability of municipal securities professionals to contribute to and solicit contributions to the political campaigns of state officials from whom they obtain business," id. at 939, but did not "eliminate all possible methods by which underwriters may curry favor," and did not apply to the heads of "banks with municipal securities departments or subsidiaries." Id. at 946. As this Court held, "the First Amendment does not require the government to curtail as

much speech as may conceivably serve its goals." Ibid. Under Blount, once it has been established that "the proffered state interest actually underlies the disputed law * * * there is no occasion for any inquiry into whether some broader restriction on speech would more effectively advance the specified set of legislative aims." Fraternal Order of Police v. United States, 173 F.3d 898, 904 (D.C. Cir.), cert. denied, 528 U.S. 928 (1999).[4]

Likewise, in the absence of an independent reason for stricter First Amendment scrutiny, the First Amendment does not require "a perfect []or even the best available fit between means and ends." Blount, 61 F.3d at 946. Indeed, it is settled that, even where intermediate First Amendment scrutiny is required – a standard the panel majority rejected as too demanding (278 F.3d at 1333-34) – the courts are not to "invalidate the preferred remedial scheme become some alternative solution is marginally less intrusive on a speaker's First Amendment interests." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 217-18 (1997).

To be sure, Congress could have drafted a more comprehensive character qualification provision – one that, for example, imposed an absolute statutory disqualification on "civil wrongdoers, felons, [or] inveterate regulatory violators," as well as former unlicensed broadcasters. See 278 F.3d at 1331-32. Likewise, Congress could have chosen to permit certain persons who engaged in

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[4] See Mariani v. United States, 212 F.3d 761, 773-74 (3d Cir.), cert. denied, 531 U.S. 1010 (2000); Moser v. FCC, 46 F.3d 970, 974 (9th Cir.), cert. denied, 515 U.S. 1161 (1995). See also Buckley v. Valeo, 424 U.S. 1, 105 (1976) ("a statute is not invalid under the Constitution because it might have gone farther than it did") (citation omitted).

unlicensed broadcasting – for example, those who conduct was unknowing or who could demonstrated that they had been rehabilitated – to apply for LPFM licenses. See id. at 1332. But it is equally clear that Congress is empowered under the Constitution to come to its own policy judgment regarding LPFM license eligibility.

2. The panel majority's ruling also rests on a worrisome misapplication of this Court's narrow decision in News America Publ., Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988), a case which until now has been confined to its unique and extraordinary facts. If left in place, the majority's unwarranted extension of News America threatens to beset this Court with a multitude of future challenges to federal statutes on the grounds that they, too, are "poorly aimed." 278 F.3d at 1332.

As Judge Henderson recognized, "[t]his case is nothing like News America." 278 F.3d at 1334. In News America, this Court invalidated a statute that prohibited the FCC from extending existing waivers of its newspaper-television cross-ownership rules, a prohibition that, as the panel majority acknowledged, "affected only two such waivers, both held by a single publisher/broadcaster, Rupert Murdoch." 278 F.3d at 1330. See News America, 844 F.2d at 804-811. The statute thus "impinge[d] on a closed class, consisting exclusively of Murdoch," who was "not only the sole current member of the class, but [was] the sole party that [could] ever be a member." Id. at 810 & n.13. "By contrast," the RBPA's character qualification provision "applies to the entire class of those who as of the time of their license applications have unlawfully engaged in LPFM broadcasting"; it "includes persons who broadcast

illegally after the Act's passage as well as those who had already done so before enactment." 278 F.3d at 1334 & n.1. Moreover, unlike the class of one identified by the statute at issue in News America, the members of the class affected by the RBPA's character qualification provision "are many and unidentified." Id. at 1335.

The panel majority acknowledged that "the class of pirate microbroadcasters is neither 'closed' nor as small as News America's single-member class." Id. at 1330. The majority nonetheless held News America analogous because it found the class identified by the RBPA's character qualification provision to be "well-defined (consisting of all pirates)," and because the provision focused on unlicensed broadcasters "'with the precision of a laser beam.'" Id. at 1330-31 (quoting News America, 844 F.2d at 814). But the fact that a statute defines clearly the class of persons that are subject to its terms is a mark of responsible legislative craftsmanship, not a constitutional infirmity; laws are supposed to delineate clearly their intended scope. See, e.g., Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). As for the News America court's "laser beam" characterization, that was based on the fact that the statute at issue struck "at Murdoch" alone. 844 F.2d at 814. The panel's attempt to commandeer the same term to portray the RBPA's far broader character qualification provision divests the description of all meaning.

The News America court was also troubled by the extensive and adverse focus on a single individual, identified by name, in the legislative history of statute before it, see 844 F.2d at 806-10, which, the court suggested, "might support" inferences of "censor-

ial intent" by Congress. Id. at 809-10. In this case, there is not the slightest evidence in the legislative history of an illicit legislative motive, see 278 F.3d at 1331, much less, as Judge Henderson pointed out, the "thorough[] excoriat[ion]" that Rupert Murdoch received. Id. at 1335 n.3.

There is also no basis for the panel majority's suggestion (id. at 1333) that the structure of the RBPA's character qualification provision is such as to "'raise[] a suspicion' that perhaps Congress's 'true' objective was not to increase regulatory compliance, but to penalize microbroadcasters' 'message.'" As Judge Henderson emphasized, the RBPA's character qualification provision "applies to the entire class of those who as of the time of their license applications have unlawfully engaged in LPFM broadcasting." Id. at 1334. The character qualification provision applies to all who engaged in unlicensed radio broadcasting, regardless of the message they intended to communicate; it thus disqualifies LPFM applicants because of their conduct, not their message. As Judge Henderson recognized, such a structure provides no basis on which to infer that "Congress intended to punish any particular 'message.'" Id. at 1335.

The panel majority noted that Ruggiero "allege[d] viewpoint discrimination," and that many unlicensed broadcasters "viewed their piracy as 'civil disobedience.'" Id. at 1333. But the majority "reject[ed] [the] argument that penalizing microbroadcasting violates the First Amendment," ibid. (citing Grid Radio v. FCC, 278 F.3d 1314 (D.C. Cir. 2002)), and refused to "endorse the pirates' tactics." 278 F.3d at 1333. The majority likewise made

clear that its conclusion that its invalidation of the character qualification provision was not based on any "belie[f] [that] the RBPA discriminates against the pirates' 'message.'" Ibid.

* * * * *

In virtually every case in which the scope of a statute is challenged, it is possible to contend that additional persons should have been covered, or others excluded. But the choice among permissible alternatives is for Congress, not the courts. To accept the panel majority's invalidation of a content-neutral federal statute because it preferred a tighter fit between legislative ends and means is to invite constitutional challenges to a host of enactments where similar arguments can – and will – be made. The majority's ruling conflicts with Blount, erroneously expands News America, and blesses a wholly unwarranted judicial intrusion into Congress's domain. It should be reheard.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing, or in the alternative, rehearing in banc.

Respectfully submitted,

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MARCH 2002

ADDENDUM

CERTIFICATE OF PARTIES AND AMICI

The following is a list of all persons who are parties, intervenors, and amici in this Court:

Petitioner – Greg Ruggiero.

Respondents – Federal Communications Commission

United States of America

This case was originally consolidated with NAB v. FCC, No. 00-1054, a case which involved different issues and in which additional parties and amici participated. However, the two cases were deconsolidated by order dated February 8, 2002.

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 2002, I filed and served the foregoing Petition for Rehearing and Petition for Rehearing In Banc by causing copies to be delivered to the Clerk of the U.S. Court of Appeals for the D.C. Circuit by hand, and by Federal Express overnight delivery to:

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